

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
22,293-s42M BY HAROLD A. GAUB)

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on July 1, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Order.

FINAL ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 22,293-s42M by Harold A. Gaub is hereby granted to appropriate up to 3 acre-feet per annum from an unnamed tributary of Spring Creek, a tributary of Cabin Creek, to be diverted at a point in the SE1/4 NW1/4 NW1/4 of Section 10, Township 12 North, Range 54 East, M.P.M., in Prairie County, Montana, to be used for supplemental flood irrigation on 25 acres in the NE1/4 and 5 acres in the NW1/4, both in Section 10, Township 12 North, Range 54 East, M.P.M., for a total of 30 acres, more or less, from January 1 to December 31, inclusive, of each year.

2. Provisional Permit No. 21,715-s42M is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. The issuance of this Provisional Permit in no way reduces the Permittee's liability for damages caused by Permittee's exercise of this Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

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DATED this 24th day of July, 1980.

David L. Pengelly
DAVID L. PENGELLY, D.M.R.&
HEARING EXAMINER

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
22,293-s42M BY HAROLD A. GAUB)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on March 26, 1980, at Terry, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 22,293-s42M, David Pengelly, Hearing Examiner, presiding. The hearing in this matter was held concurrently with hearings in the Matter of Application Nos. 21,715-s42M, 21,716-s42M, and 21,862-c42M.

The Applicant, Harold A. Gaub, appeared at the hearing and presented testimony in support of the Application. Mr. Gaub was represented by legal counsel, Mr. John Prater of Terry, Montana. One exhibit was introduced supporting the Application, to wit:

Applicant's Exhibit:

A-1 Copy of aerial photo showing Applicant's irrigated lands
and proposed irrigation projects

The Applicant's exhibit was marked accordingly and received into the record without objections.

Two (2) Objectors attended the hearing and presented testimony. The Objectors, Messrs. Don and Kurt Ulrich were not represented by legal counsel. Mr. Gottlieb Ulrich testified on behalf of the Objectors. The Objectors introduced five (5) exhibits supporting their objections,

Objectors' Exhibits:

- O-1 Copy of Notice of Water Right Appropriation by Rudolph Ulrich
- O-2 Photographs of Spring Creek in the vicinity of the Objector's property in 1977
- O-3 A table of hay tonnages correlated to the years 1973 thru 1979 claimed to have been taken from the Objector's fields
- O-4 Photocopies of photographs of Spring Creek in the vicinity of the Objector's property; 1969, 1970 - 76 and 1978 and 1979
- O-5 Photograph of Objector's diversion dike taken on March 26, 1980

Exhibit O-1 was received into the record without objections. Counsel for the Applicant objected for the record to the entry of Exhibits O-2, O-4 and O-5 based on their probative value. Counsel for the Applicant objected to the entry into the record of Exhibit O-3. Due to the informal nature of the hearing, the objection is overruled and Objector's Exhibit O-3 is accepted into the record.

Montana Department of Natural Resources and Conservation Personnel present on behalf of the Department were Arlin Krogstad, Hearing Representative; Keith Kerbel, Miles City Water Rights Bureau Field Office Manager; and Vicki Woodrow, Hearing Recorder. Also present at the hearing was Rick Burger, Department Pilot. The Department was not represented by legal counsel. No exhibits were introduced by the Department.

The Objectors requested that their testimony presented at a prior hearing held on Application Nos. 7,545-s42M and 8,877-s42M by the Applicant be entered into the record. Counsel for the Applicant requested that the Hearing Examiner only use that earlier testimony as it related to the criteria listed in Section 85-2-311, MCA, 1979. The transcript of

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1 the above hearing has been entered into the record on this matter.

2
3 SUMMARY OF RECORD

4 1. On March 23, 1979, the Department received an Application for
5 Beneficial Water Use Permit No. 22,293-s42M by Harold A. Gaub to appropriate
6 up to 3 acre-feet per annum from an unnamed tributary of Spring Creek,
7 a tributary of Cabin Creek, to be diverted at a point in the SE1/4 NW1/4
8 NW1/4 of Section 10, Township 12 North, Range 54 East, M.P.M., in Prairie
9 County, Montana, to be used for supplemental flood irrigation on 25
10 acres in the NE1/4 and 5 acres in the NW1/4, both in Section 10, Township
11 12 North, Range 54 East, M.P.M., for a total of 30 acres, more or less,
12 from January 1 to December 31, inclusive, of each year.

13 2. On May 24 and 31, and June 7, 1979, the Department caused to be
14 duly published in the Terry Tribune, Terry, Montana, notice of Application
15 for Beneficial Water Use Permit No. 22,293-s42M.

16 3. On June 4, 1979, the Department received an objection to the
17 above Application from Donald and Judith Ulrich and Kurt and Judy Ulrich.

18 PROPOSED FINDINGS OF FACT

19 For purposes herein, based on testimony presented at the hearing
20 and information available in the Department's file on this matter, it is
21 found:

22 1. That whenever water is flowing through the 18-inch tube in the
23 Objector's dike system there are unappropriated waters in the source of
24 supply which can be put to the use proposed by the Applicant.

25 2. That water is available in the amount the Applicant seeks to
26 appropriate.

27 3. That throughout the period during which the Applicant seeks to
28 appropriate, the amount requested is available.

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1 4. That the Objectors do have existing use rights for irrigation
2 and stock water which must be protected. The Objector's irrigation
3 right is for 300 miner's inches and their stock water right is for
4 sufficient water for approximately 200 head of livestock.

5 5. That the rights of prior appropriators will not be adversely
6 affected by the granting of this permit.

7 6. That the proposed means of diversion or construction are adequate.

8 7. That the proposed use of water is a beneficial use.

9 8. That the proposed use will not interfere unreasonably with
10 other planned uses or developments for which a permit has been issued or
11 for which water has been reserved.

12
13 PROPOSED CONCLUSIONS OF LAW

14 1. Section 85-2-311, MCA, 1979, states that "The department shall
15 issue a permit if:

16 1. there are unappropriated waters in the source of supply:

17 a. at times when the water can be put to the use
18 proposed by the applicant;

19 b. in the amount the applicant seeks to appropriate; and

20 c. throughout the period during which the applicant
21 seeks to appropriate, the amount requested is
22 available;

23 2. the rights of a prior appropriator will not be adversely
24 affected;

25 3. the proposed means of diversion or construction are adequate;

26 4. the proposed use of water is a beneficial use;

27 5. the proposed use will not interfere unreasonably with
28 other planned uses or developments for which a permit
 has been issued or for which water has been reserved; . . ."

1 2. Section 85-2-401 (1) states ". . . As between appropriators,
2 the first in time is the first in right. Priority of appropriation does
3 not include the right to prevent changes by later appropriators in the
4 condition of water occurrence, such as the increase or decrease of
5 streamflow or the lowering of a water table, artesian pressure, or water
6 level, if the prior appropriator can reasonably exercise his water right
7 under the changed conditions. . . ."

8 3. It is concluded that there are unappropriated waters in the
9 source of supply in the amount the Applicant seeks to appropriate and
10 throughout the period during which the Applicant seeks to appropriate
11 such water is available.

12 4. It is concluded that the granting of the above Application will
13 not adversely affect prior appropriators.

14 5. It is concluded that the proposed means of diversion or construction
15 are adequate.

16 6. It is concluded that the proposed use of water is a beneficial
17 use.

18 7. It is concluded that the proposed use will not interfere
19 unreasonably with other planned uses or developments for which a permit
20 has been issued or for which water has been reserved.

21 8. Nothing decided herein has bearing on the status of water
22 rights claimed by the Applicant other than those herein applied for,
23 nor does anything decided herein have bearing on the status of claimed
24 rights of any other party except in relation to those rights herein
25 applied for, to the extent necessary to reach a conclusion herein.

26 Based on the Proposed Findings of Fact and Proposed Conclusions of
27 Law, the following Proposed Order is hereby made:
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PROPOSED ORDER

1
2 1. Subject to the conditions and limitations listed below, Provisional
3 Permit No. 22,293-s42M by Harold A. Gaub is hereby granted to appropriate
4 up to 3 acre-feet per annum from an unnamed tributary of Spring Creek,
5 a tributary of Cabin Creek, to be diverted at a point in the SE1/4 NW1/4
6 NW1/4 of Section 10, Township 12 North, Range 54 East, M.P.M., in Prairie
7 County, Montana, to be used for supplemental flood irrigation on 25
8 acres in the NE1/4 and 5 acres in the NW1/4, both in Section 10, Township
9 12 North, Range 54 East, M.P.M., for a total of 30 acres, more or less,
10 from January 1 to December 31, inclusive, of each year.

11 2. Provisional Permit No. 21,715-s42M is granted subject to existing
12 rights in the source of supply and any final determination of those
13 rights as provided by Montana law.

14 3. The issuance of this Provisional Permit in no way reduces the
15 Permittee's liability for damages caused by Permittee's exercise of this
16 Provisional Permit, nor does the Department in issuing the Provisional
17 Permit in any way acknowledge liability for damage caused by the Permittee's
18 exercise of this Provisional Permit.

NOTICE

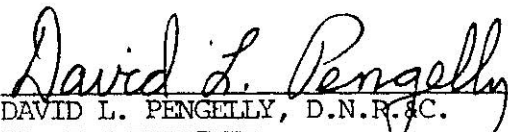
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21 This Proposed Order is offered for the review and comment of all
22 parties of record. The review and comment period shall commence with
23 the service of this Proposed Order and shall end ten (10) days thereafter.
24 No extensions of time for comment will be granted.

25 The Final Order in this matter will be sent to all parties by
26 certified mail.
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1 The Hearing Examiner's Final Order may be appealed in accordance
2 with the Montana Administrative Procedures Act by filing a petition in
3 the appropriate court within thirty (30) days after service of the Final
4 Order.

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6 DATED this 1st day of July, 1980.

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9 DAVID L. PENGELLY, D.N.R.&C.
10 HEARING EXAMINER
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